

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Petition for Declaratory Ruling Concerning the)
Requirement for Good Faith Negotiations)
Among Economic Area Licensees and)
Incumbent Licensees in the Upper 200)
Channels of the 800 MHz Band)

PR Docket No. 93-144

MEMORANDUM OPINION AND ORDER

Adopted: March 1, 2001

Released: March 2, 2001

By the Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

1. The Wireless Telecommunications Bureau, Commercial Wireless Division has before it a Petition for Declaratory Ruling filed by Nextel Communications, Inc. (Nextel), on October 26, 2000 (Petition).¹ Nextel requests clarification of the Commission's requirement that Economic Area (EA) licensees and incumbent licensees in the upper 200 channels of the 800 MHz band negotiate in good faith during the mandatory negotiation period.² For the reasons stated below, we deny Nextel's Petition.

I. Background

2. In the Commission's 800 MHz Auction in 1997 (Auction No. 16), winning bidders acquired geographic EA licenses for markets on Channel Blocks A, B, or C for the upper 200

¹ See Public Notice, "Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling Concerning the Requirement for Good Faith Negotiations Among Economic Area Licensees and Incumbent Licensees in the Upper 200 Channels of the 800 MHz Band," DA 00-2694 (rel. Nov. 29, 2000). The American Mobile Telecommunications Association, Inc. (AMTA) and Small Business in Telecommunications (SBIT) filed comments on December 14, 2000. Chadmoore Wireless Group, Inc. (Chadmoore), Morrison & Foerster LLP, and Nextel filed Reply Comments on December 21, 2000. Nextel filed an *ex parte* presentation on January 5, 2001. See Letter dated January 5, 2001 from Albert J. Catlano, Nextel counsel, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau.

² See 47 C.F.R. § 90.699(b) (good faith negotiation requirement).

channels of the 800 MHz band.³ In order to facilitate the transition of these 200 channels to EA licensing, the Commission established a one-year voluntary negotiation period, followed by a one-year mandatory negotiation period⁴ for EA licensees to negotiate relocation of incumbent site-based licensees in their respective channel blocks.⁵ EA licensees were required to notify incumbents of their intention to relocate them on or before March 4, 1999.⁶ If an EA licensee did not provide timely notice of its intention to relocate an incumbent, the EA licensee forfeited its right to require the incumbent to relocate at any time in the future.⁷ During the current mandatory negotiation period,⁸ both the EA licensee and the incumbent must negotiate in good faith.⁹ If no agreement is reached during the mandatory negotiation period, an EA licensee may request involuntary relocation of the incumbent licensee's system.¹⁰ However, an EA licensee that fails to negotiate in good faith during the mandatory negotiation period will forfeit its right to request involuntary relocation.¹¹

3. In its Petition, Nextel seeks clarification that: (1) an incumbent's obligation to negotiate in good faith requires it to provide certain basic, non-proprietary technical information to an EA licensee; (2) a general relocation plan, based on public information regarding the number of channels and location, constitutes a good faith offer of relocation by an EA licensee; (3) an incumbent's refusal to provide basic system-specific technical data when requested by an EA

³ See Public Notice, "800 MHz SMR Auction Closes: Winning Bidders in the Auction of 525 Specialized Mobile Radio Licenses," 12 FCC Rcd. 20417 (1997).

⁴ The Bureau extended the mandatory negotiation period 90 days, until March 5, 2001. See Public Notice, "Wireless Telecommunications Bureau Extends the Mandatory Negotiation Period for the Relocation of Incumbent Licensees in the 800 MHz Band until March 5, 2001," DA 00-2672 (rel. Nov. 27, 2000).

⁵ Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *First Report and Order*, 11 FCC Rcd. 1463 (1995), and *Second Report and Order*, 12 FCC Rcd. 19079 (1997). See 47 C.F.R. §§ 90.699(b)(1)& (2).

⁶ See Public Notice, "Wireless Telecommunications Bureau Announces the Commencement of the Voluntary Negotiation Period for the Relocation of Incumbent Licensees in the 800 MHz Band," 13 FCC Rcd. 23381, DA 98-2434 (rel. Dec. 4, 1998).

⁷ 47 C.F.R. § 90.699(b)(1).

⁸ See n.4, *supra*.

⁹ 47 C.F.R. § 90.699(b)(2).

¹⁰ 47 C.F.R. § 90.699(c) (involuntary relocation procedures). If an EA licensee requests involuntary relocation of the incumbent, it must guarantee payment of relocation costs, including all engineering expenses, equipment costs, site and FCC fees, as well as any legitimate and prudent transaction expenses incurred by the incumbent that are directly attributable to an involuntary relocation, subject to a cap of two percent of the hard costs involved. *Id.*

¹¹ 47 C.F.R. § 90.699(b)(2).

licensee constitutes bad faith that would subject the incumbent to a license revocation proceeding; and (4) an incumbent's refusal to provide system-specific technical data should create a presumption that a relocation plan developed by the EA licensee based only on public information meets the four-factor comparability test under Section 90.699(d) of the Commission's Rules.¹²

II. Discussion

4. The Commission's *PCS/Microwave Relocation Order*¹³ informs our discussion of good faith negotiations in this proceeding. In that order, the Commission stated that "the question of whether parties are negotiating in good faith typically requires consideration of all the facts and circumstances underlying the negotiations, and thus is likely to depend on the specific facts in each case."¹⁴ Because determinations of good faith necessarily are fact specific, we decline to rule that good faith requires an incumbent licensee in all circumstances to provide an EA licensee a preset package of information such as the "basic, non-proprietary technical information" desired by Nextel. The Commission must evaluate the specific facts and circumstances underlying an incumbent's refusal to provide information to determine if the incumbent has breached its duty to negotiate in good faith. Similarly, the Commission must consider the facts and circumstances of an EA licensee's refusal to provide information to an incumbent licensee to determine if it has breached its duty to negotiate in good faith.¹⁵ In conducting its evaluation of disputes regarding good faith in this context, the Commission will generally apply the criteria set forth in the PCS/Microwave context in Section 101.73 of our rules.¹⁶ For example, when evaluating claims that a party has not negotiated in good faith, the Commission will consider whether either party has withheld information requested by the other party that is necessary to estimate relocation costs or facilitate the relocation process.¹⁷ We also decline to rule that a general relocation plan, based on public information regarding the number of channels and location, constitutes a good faith offer of relocation by an EA licensee. Whether such a generalized relocation plan constitutes a good faith offer of relocation must be examined on a case-by-case basis.

5. Several parties strenuously object to Nextel's request for a ruling that an incumbent's refusal to provide basic system-specific technical data when requested by an EA licensee during the mandatory negotiation period constitutes bad faith that would subject the

¹² 47 C.F.R. § 90.699(d).

¹³ Amendment of the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 8825 (1996) (*PCS/Microwave Relocation Order*).

¹⁴ *Id.* at 8837, ¶ 20.

¹⁵ *See id.*

¹⁶ 47 C.F.R. § 101.73.

¹⁷ *See* 47 C.F.R. 101.73(b)(4); *see also* 11 FCC Rcd. at 8837, ¶ 21.

incumbent to a license revocation proceeding.¹⁸ Chadmoore, for example, states that "license revocation is the 'death penalty' of the industry and should not be considered or undertaken lightly."¹⁹ In the *PCS/Microwave Relocation Order*, the Commission determined that "penalties for failure to negotiate in good faith should be imposed on a case-by-case basis."²⁰ We therefore decline to rule that the sanction of license revocation would always be appropriate for failing to provide certain information to an EA licensee; such a ruling would depart from the Commission's case-by-case approach for determining sanctions for failing to negotiate in good faith.

6. Finally, Nextel urges the Commission to rule that, if an incumbent declines to provide technical data to an EA licensee, a presumption would arise that a relocation plan developed by the EA licensee based solely on publicly available information would meet the four-factor comparable facilities test under Section 90.699(d). We believe the sufficiency of any proposed relocation plan would have to be decided on a case-by-case basis. We therefore decline to adopt the presumption proposed by Nextel when there is no specific case before us.

7. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), Section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 5(e), and Sections 1.4 and 90.699 of the Commission's rules, 47 C.F.R. §§ 1.4 and 90.699, the Petition for Declaratory Ruling filed by Nextel Communications, Inc., on October 26, 2000, in the above-captioned proceeding is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William W. Kunze
Chief, Commercial Wireless Division
Wireless Telecommunications Bureau

¹⁸ SBIT Comments at 3.

¹⁹ Chadmoore Reply Comments at 2.

²⁰ *PCS/Microwave Relocation Order*, 11 FCC Rcd. at 8838, ¶ 22.